

## Agencies Face Limited Options For Twitter Crackdowns

By **Kelcee Griffis**

*Law360 (June 2, 2020, 7:07 PM EDT)* -- President Donald Trump's executive order addressing perceived bias on social media platforms is expected to have few binding effects, but the order will likely trigger a flurry of activity anyway within the federal agencies charged with carrying it out.

While the Federal Communications Commission — ultimately tasked with implementing Trump's order — has little to no authority over web platforms, it may plausibly float the issue for general public comment. In the meantime, Congress could get involved and either propose a law rolling back protections for platforms or grill agencies over perceived inaction on the subject.

"It's mostly just sound and fury, a way to give support to more legislative approaches which would be more effective," said Stanford Law School media expert Ryan Singel of the president's order to federal officials.

Trump framed the order he signed Thursday as a way to crack down on "online censorship." The order ostensibly targeted platforms like Twitter and Facebook for what the White House views as the unfair removal or labeling of viewpoints that moderators don't agree with.

It specifically directs a branch of the U.S. Department of Commerce, the National Telecommunications and Information Administration, to send a rulemaking petition to the FCC within 60 days. The petition will ask the FCC to clarify under what circumstances web platforms could lose their so-called "shield" under Section 230 of the Communications Decency Act of 1996 and become liable for content users post on the platform.

The original purpose of the provision was to protect websites from being held responsible for controversial content that users post and litigated out of business. If the liability shield is diminished, websites could be more easily taken to court over what their users post and how they handle such content.

According to four people Law360 spoke to on the condition of anonymity, the FCC has no obligation to respond to the NTIA's forthcoming request with its own rulemaking. Nevertheless, it likely will, given the political pressure the commission is facing. The path of least resistance — which the agency is likely to take — would be to attach a cover letter to the NTIA's request and put that package out for public comment.

This route would mean the FCC "doesn't have to have its fingerprints all over" the rulemaking request, but it can still launch an inquiry in keeping with the executive branch's wishes, one insider said.

Forwarding a rulemaking request with minimum agency commentary is a common step for the FCC, which is often bombarded with rulemaking petitions, the sources said.

For example, the FCC picked up an NTIA request in 2018 for rule changes that would grant government entities priority access to wireless operators' networks during emergencies. The FCC received conflicting advice and asked for a fresh round of comments last year, but it apparently has yet to resolve the matter.

In the meantime, it appears the NTIA already had been staffing up to address such a request from the White House. In April, the agency hired communications regulation and antitrust specialist Adam Candeub as a deputy assistant secretary. According to his biography, the Jones Day alum is on a leave of absence from a teaching post at Michigan State University's law school.

Candeub has already taken on social media platforms for blocking inflammatory views, having previously represented a white separatist in a now-dismissed lawsuit against Twitter over an account suspension.

Through that lens, Singel said the NTIA's hire could fit the executive's branch's pattern of painting itself as a victim of unfair media bias against the administration.

"The Trump campaign and administration has long found it politically useful to pit themselves against large tech companies, large media companies, the media in general," he said.

Singel added that "it's not surprising to me that someone who fits into that mindset" would be hired at Commerce when a social media-related executive order was in the works.

In the meantime, the order could invite further congressional oversight and provoke lawmakers to act. Trump tweeted last week that he wants to "revoke" Section 230, which only lawmakers could do.

Additional changes appear to be on the minds of at least a couple of congressional leaders. Rep. Ro Khanna, D-Calif., told The Hill last week that implementing an online equivalent of the now-repealed broadcast "fairness doctrine" might be a possibility. The policy mandated that broadcasters present "balanced" viewpoints on television and radio until it was abolished in 1987.

Still, Khanna suggested that social media platforms could pair contradictory claims, allowing a maligned group or individual the chance to respond in a high-profile way. "What I would say is, you defeat speech with speech. But you didn't give one person a huge megaphone and not allow a fair response," he said in a taped interview.

In his own bill last year, Sen. Josh Hawley, R-Mo., contemplated a different way to narrow the liability shield. His Ending Support For Internet Censorship Act would require large online platforms to seek certification from the Federal Trade Commission that the way they moderate posts is not "politically biased" in order to benefit from Section 230's protections.

Last week, Hawley queried Twitter over how it decides to label or censor Trump's posts on the platform and demanded answers by mid-June.

But in the absence of a new law, the executive order may only lead to congressional inquiries with little net effect, said Christopher Cole, who co-chairs Crowell & Moring LLP's advertising and media group.

"I think this is sort of aimed at congressional show trial stuff," he said. "They can call in commissioners to talk about what they've done to implement the executive order ... but Congress is usually unwilling to get in the middle of an ongoing rulemaking."

--Additional reporting by Cara Bayles, Bonnie Eslinger, Ben Kochman and Bryan Koenig. Editing by Philip Shea.